1908
May 4.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox

EMPEROR v. RAM BILAS.*

Criminal Procedure Code, sections 133 *et seqq.—Procedure—Obstruction to public way—Jury.*

Where, at the request of a person upon whom a notice has been served under section 133 of the Code of Criminal Procedure a jury is appointed under section 138 of the Code, it is within the competence of the jury to decide as to the validity of an objection that the way alleged to have been obstructed is not a public way. It is not for the Magistrate to decide whether such an objection is raised *bonâ fide* before referring it to the jury. *Kailash Chunder Sen* v. *Ram Lall Mittra* (1) not followed.

Held also that there is no special procedure laid down by the Code to be adopted by a jury appointed under section 138 in coming to a finding on the questions submitted to them. *Queen-Empress* v. *Khushali Ram*, (2) referred to.

Held also that a person who has applied for a jury under section 138 is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. *In the matter of the petition of Lachman* (3) followed.

This was an application for revision made by one Ram Bilas, the owner of a firm which had a shop situated in the bazar of Barauli in the district of Gorakhpur. It appeared that Ram Bilas usually resided in Jaipur and that the shop at Barauli was conducted by managers on his behalf. The sub-divisional officer of Deoria, being of opinion that a chabutra and a tin shed attached to the shop of Ram Bilas at Barauli was an unlawful obstruction which should be removed from a road used by the public, issued a notice to Ram Bilas calling upon him to show cause why this chabutra should not be removed. The notice was dated 17th of August 1907, and appears to have been accepted by one Makund Ram, mukhtar-am of the firm of Ram Karan Ram Bilas, by which name the Barauli shop was known. On the 16th of December 1907, an application was put in, signed by a vakil on behalf of the firm of Ram Karan Ram Bilas, asking for a jury to decide upon the propriety of the sub-divisional officer's order and nominating two persons to act as jurors on behalf of the firm

* Criminal Rivision No. 59 of 1908 from an order of Ram Ratan Lal, Sub-Divisional Officer of Deoria, District Gorakhpur, dated the 11th of January 1908.

(1) (1899) I. L. R., 26 Calc., 869. (2) (1895) I. L. R., 18 All., 168.
(3) Weekly Notes, 1900, p. 180.

of Ram Karan Ram Bilas. The Magistrate accepted the applicant's nominees, and named two other persons to serve on the jury. On the 3rd of January 1908 the jury submitted their verdict, which was duly placed on the record, and an order was passed that the pacca chabutra and tin shed should be removed. Against this order Ram Bilas applied in revision to the High Court.

Mr. *C. Ross Alston*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—The applicant in this case is one Ram Bilas. The said Ram Bilas is the owner of a firm which has a shop situate in Barauli Bazar in the district of Gorakhpur.

According to an affidavit, dated the 9th of March 1908, and filed in these proceedings, Ram Bilas resides in the Jaipur State, and his firm at Barauli, known as the firm of Ram Karan Ram Bilas, is in the hands of managers.

The Sub-Divisional Magistrate being of opinion that a chabutra attached to the premises of Ram Karan Ram Bilas was an unlawful obstruction which should be removed from a road used by the public, issued a notice upon Ram Bilas calling upon him to appear and show cause why the obstruction should not be removed. This notice is dated the 17th of August 1907, and bears an endorsement which is said to be an endorsement by Makund Ram, mukhtar-am of the firm of Ram Karan Ram Bilas. On the 16th of December 1907, an application was put in and signed by a vakil on behalf of Ram Karan Ram Bilas to the effect that he nominated certain persons to act on his behalf as a jury to decide the question raised by the Sub-Divisional Magistrate. The Magistrate accepted the persons named by or on behalf of Ram Karan Ram Bilas and nominated two other persons to serve on the jury. On the 3rd of January 1908, the jury submitted a verdict, which was duly placed upon the record, and an order passed that the pacca chabutra and tin shed should be removed. No objection at the time was raised to this verdict, as the order of the Magistrate on the same will show. But in revision here it is urged that section 133 of the Code of Criminal Procedure cannot apply to these proceedings. It is further

1908

EMPEROR v. RAM BILAS.

contended that the proceedings have not been regularly held and that the conclusion was not based on the evidence, but on a local inspection.

Among other grounds urged before me was that the notice under section 133 had never been legally served upon Ram Bilas. Neither of the affidavits go so far as to say that he (Ram Bilas) has not been cognizant of the proceedings. Stress is laid on the technical point that the summons was served, not upon him but upon his agent. I find it impossible to believe that in a matter like this Ram Bilas could or would have been kept in ignorance of what was going on, and this adds more significance to the fact that the affidavit nowhere expresses his personal ignorance of what was taking place. Again, the learned counsel who appeared for Ram Bilas took his stand upon several rulings of the Calcutta High Court, notably that of *Kailash Chunder Sen* v. *Ram Lall Mittra* (1). The Calcutta High Court appear to hold that when a person called upon under section 133 to show cause why an obstruction should not be removed from a public way, denies that the latter is a public way, it is for the Magistrate to determine whether this is a *bonâ fide* objection, and he cannot, in spite of the objection, unless he determines that it is not *bonâ fide*, refer the matter to the jury. The jury is not competent to decide whether the way obstructed is or is not a public way. How far this goes or does not go beyond the Code I need not decide. The question which was at issue was that the chabutra and shed complained of were unlawful obstructions which should be removed from a way which was lawfully used by the public. The contention raised on behalf of Ram Bilas is that the chabutra and shed are not situate in that portion which is admittedly portion of a way lawfully used by the public, but fall within a certain portion of that ground which had been by some Magistrate remitted for use by the persons who have erected shops in this public place. I think the question raised was one which could, under the terms of the Code, be left to a jury to decide.

Again, it was contended on the strength of the Calcutta case that a jury was bound to hear the parties and such witnesses as they desired to have heard. This Court, however, in

(1) (1899) I. L. R., 26 Calc., 869.

1908

EMPEROR v. RAM BILAS.

Queen-Empress v. *Khushali Ram*, (1) laid down no hard and fast rule upon this point. The learned Chief Justice, who decided that case, held that if a jury required evidence, evidence should be produced before it, and that in that case it was for the Magistrate to show by evidence that the obstruction referred to was an obstruction of a public way or in a public place. So far as I can see, Chapter X does not lay down any rules as to the procedure that must be adopted by a jury. The questions which are now raised are questions which, it appears to me, should have been raised by or on behalf of the firm long ago in the case.

It has been held by a learned Judge of this Court in *In the matter of the petition of Lachman* (2) that a person who applies for a jury is bound by the verdict of the jury and cannot raise such a plea as that the obstruction was caused in the exercise of a *bonâ fide* claim of right. So far as I can judge from the record, the firm of Ram Karan Ram Bilas had long and sufficient notice of the action which the Divisional Magistrate intended to take, and I am not prepared in revision to interfere. I dismiss the application.

APPELLATE CIVIL.

1908
May 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

PABITRA KUNWAR (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANT). *

Procedure—Refusal of Court of first instance to examine all the plaintiff's witnesses—Appeal by defendant decreed—Remand.

Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. *Held* that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. *Kifayat-ullah Mondol* v. *Sakina Bibi* (3) and *Kalyani Prasad* v. *Bishnath* (4) referred to.

IN a suit pending in the Court of the Munsif of Benares, owing to the failure of the defendant to comply with an order of

* Second Appeal No. 685 of 1907, from a decree of G. A. Paterson, District Judge of Benares, dated the 7th of March 1907, reversing a decree of Hira Lal Singh, Munsif of Benares, dated the 21st of December 1906.

(1) (1895) I. L. R., 18 All., 158. (3) (1897) 11 C. W. N., p. xcii.
(2) Weekly Notes, 1900, p. 180. (4) Weekly Notes, 1905, p. 266.